ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION I

CA06-749

APRIL 11, 2007

MARKET PLACE PARTNERSHIP
APPELLANT

V.

HOLLYWOOD HANGAR, LLC, TRACY THIBODEAUX AND DANA THIBODEAUX
APPELLEES

APPEAL FROM THE SALINE COUNTY CIRCUIT COURT
[NO. CV2005-1220-3]

HON. GRISHAM A. PHILLIPS, CIRCUIT JUDGE

REVERSED and REMANDED ON DIRECT APPEAL; AFFIRMED ON CROSS-APPEAL

This landlord-tenant dispute presents questions concerning the construction of a lease. The landlord, appellant Market Place Partnership, contends on appeal that the trial court construed the lease in such a manner as to limit the elements of damages that Market Place could recover under the lease. The tenants, appellees Tracy and Dana Thibodeaux, cross-appeal, contending that the damage award should be even lower and that the circuit court awarded an excessive attorney's fee to Market Place. We reverse and remand on direct appeal and affirm on cross-appeal.

On August 9, 2004, Market Place entered into a lease agreement with the Thibodeauxes, wherein the Thibodeauxes agreed to lease approximately 1,500 square feet of space in Little Rock. The term of the lease was for a period of five years. The lease specified the events that would constitute default by the Thibodeauxes and the remedies available to Market Place if such default occurred. Specifically, the lease provided in pertinent part:

SECTION 15.02. Remedies Default.

a.) Upon the occurrence of a Default, Owner may, at its option, then or at any time thereafter while such Default shall continue:

i.) Terminate this Lease at once or on any later date specified in a notice and immediately re-enter and take possession of the Leased Premises, including all improvements thereon and fixtures, equipment and personal property located in or about the Leased Premises; or

ii.) Re-enter and take possession of the Leased Premises or any part thereof and repossess the same and expel Tenant, and those claiming through Tenant, and remove the effects of both or either (forcibly, if necessary) without terminating the Lease or being deemed guilty of any manner of trespass and without prejudice to any remedies for arrears of rent or preceding breach of covenant. Should Owner elect to re-enter as provided herein, or should Owner take possession pursuant to legal proceedings or pursuant to any notice provided by law, Owner may terminate this Lease at any future time, or may from time to time without terminating this Lease re-let the Leased Premises or any part thereof for such term or terms and at such rental or rentals and upon such terms and conditions as Owner may deem advisable, without advertisement and by private negotiations, with the right to make such alterations and repairs to the Leased Premises as it sees fit. Owner shall have no obligation to re-enter or to make any effort to re-let the Leased Premises. No re-entry or taking of possession of the Leased Premises by Owner shall be construed as an election on Owner's part to terminate this Lease unless a written notice of such intention is given to Tenant.

b.) In the event that Owner elects to repossess the Leased Premises without terminating the Lease, then Tenant shall be liable for and shall pay to Owner all rent and other indebtedness accrued to the date of such repossession, plus rent and other indebtedness hereunder required to be paid by Tenant to Owner during the remainder of the lease term, diminished by any net sums thereafter received by Owner through re-letting the Leased Premises during said period (after deducting expenses incurred by Owner as provided in this Article). In no event shall Tenant be entitled to any excess of any rent (or rent plus other sums) obtained by re-letting over and above the rent herein reserved. Actions to collect amounts due by Tenant as provided in this Article may be brought from time to time, on one or more occasions, without the necessity of Owner's waiting until expiration of the lease term.

c.) In the event Owner terminates this Lease, Tenant shall pay the rent and other sums due prior to the time of such termination. Additionally, Tenant shall pay to Owner on demand as liquidated final damages the amount by which the rent and other sums as herein provided which would be payable hereunder from the date of such termination for what would be the then unexpired term of this Lease if same remained in effect exceeds the then fair net rental value of the Leased Premises for the same period. If any statute or rule of law governing a proceeding in which such liquidated final damages are to be proved shall validly limit the amount thereof to an amount less than the amount agreed upon hereinabove, Owner shall be entitled to the maximum amount allowable under such statute or rule of law.

d.) In case of Default, Tenant shall also be liable for and shall pay to Owner broker's fees incurred by Owner in connection with re-letting the whole or any part of the Leased Premises; the costs of removing and storing Tenant's or other occupant's property; the costs of repairing, altering, remodeling or otherwise putting the Leased Premises into condition acceptable to a new tenant or tenants for any use acceptable to Owner; and all reasonable expenses incurred by Owner in enforcing Owner's remedies, including reasonable attorneys' fees.

e.) In the event of termination of this Lease or repossession of the Leased Premises due to Default, Owner shall not have any obligation to re-let or attempt to re-let the Leased Premises, or any portion thereof, or to collect rental after re-letting; and in the event of re-letting Owner may re-let the whole or any portion of the Leased Premises for any period, to any tenant, and for any use and purpose.

In September 2005, the Thibodeauxes defaulted by failing to pay rent. Market Place notified them of the default. When the Thibodeauxes did not cure the default, Market Place served them with a notice to vacate on September 26, 2005. The notice to vacate stated that Market Place was exercising its right to terminate the lease and demanded that the Thibodeauxes vacate the premises within ten days. The Thibodeauxes vacated the premises on October 6, 2005, without paying the rent for either September or October. A new tenant was found, who entered into a lease agreement with Market Place to commence on

November 1, 2005. The new tenant's rent was higher than the rent required to be paid by Market Place's lease with the Thibodeauxes.

On October 28, 2005, Market Place filed its complaint against the Thibodeauxes for failure to make the payments as provided in the lease and sought damages of $20,336.09. The damages included rent abatements given to the Thibodeauxes and the new tenant; past-due rent and late fees; commissions paid in leasing the property to the new tenant; administrative costs for the eviction proceedings; the cost of cleaning the property after the Thibodeauxes vacated the premises; and the cost of having the locks changed. The Thibodeauxes filed an answer in which they denied the material allegations of the complaint and asserted that Market Place failed to mitigate its damages.

At trial, the parties stipulated that the Thibodeauxes were in default, leaving the question of damages to be decided. Relying on this court's decision in *McMaster v. McIlroy Bank*, 9 Ark. App. 124, 654 S.W.2d 591 (1983), the Thibodeauxes argued that Market Place elected to terminate their lease and, therefore, was limited in the damages it could recover because section 15.02(c) used the term "shall" in connection with a liquidated-damages provision. They also argued that Market Place was not entitled to the additional damages sought under section 15.02(d) because that section applies only when the landlord re-enters the premises and takes possession. In support of their interpretation of the lease, the Thibodeauxes emphasized the fact that section 15.02(c) used the term "liquidated final damages."

Market Place argued that it was entitled to the damages claimed under section 15.02(d) because that section provided that, in the case of default, the tenant "shall also" be liable for the broker's fees, the costs of repairing or remodeling the premises for new tenants, and all reasonable expenses, including attorney's fees. Market Place argued that paragraphs 15.02(c) and (d) could be read together without any conflict and merely describe different elements of damages recoverable upon default by the tenant. Market Place also presented testimony as to the types and amount of damages it was seeking.

The court ruled from the bench and found that Market Place terminated the lease, thereby limiting the damages it could recover. The court also found that there was an ambiguity between the use of the term "liquidated final damages" in section 15.02(c) and the additional damages listed in section 15.02(d). Ultimately, the court concluded that Market Place was entitled to recover the entire monthly rent for both September and October, plus a ten-percent late fee.[1] However, the court disallowed the other damages and expenses incurred by Market Place as a result of the Thibodeauxes' default. The court awarded judgment to Market Place in the amount of $4,431.26, which consisted of September and October rent plus late fees (totaling $4,661.26) less a $2,000 security deposit, court costs in the amount of $270, and an attorney's fee of $1,500. Judgment was entered on April 11, 2006, and this appeal followed.

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[1]Section 2.02 of the lease contract provided that rent not paid within ten days of its due date would incur a one-time late-payment charge of ten percent. It was undisputed at trial that this ten-percent late-payment charge would apply to rent owed by Thibodeauxes for September and October, 2005.

Direct Appeal

Market Place's first point on appeal is that it is entitled to additional damages—including its leasing fees for the new tenant and for the Thibodeauxes, the improvement allowance for the new tenants, and certain costs incurred in preparing the premises for the new tenant—under section 15.02(c) of the lease because those damages are "additional rent" as defined by section 2.02 of the lease and, further, because the amount exceeded the fair net rental value of the premises. Market Place did not make its argument regarding "additional rent" under section 2.02 at trial, and it is well settled that an appellant may not change the basis for his or her arguments or raise issues for the first time on appeal. *Carr v. Millar*, 86 Ark. App. 292, 184 S.W.3d 470 (2004). While Market Place did make an argument about the fair market rent at trial, it failed to obtain a specific ruling on the issue of whether the rent and other charges owed by the Thibodeauxes exceeded the fair market rent. It is well settled that a party's failure to obtain a ruling precludes our review of an issue on appeal. *See Olsen v. East End Sch. Dist.*, 84 Ark. App. 439, 143 S.W.3d 576 (2004). Therefore, we reject this point on appeal.

Market Place's second point on appeal is that the circuit court erred in holding that an ambiguity exists between section 15.02(c) and section 15.02(d). Market Place claims that the lease is not ambiguous and that sections 15.02(c) and 15.02(d) can and do apply at the same time. Market Place contends that the circuit court erroneously gave effect to section 15.02(c) to the exclusion of section 15.02(d) and the other provisions in the lease. It argues that these sections do not stand alone but must be read together and interpreted within the context of

the entire lease agreement. The Thibodeauxes respond, relying upon this court's decision in *McMaster, supra*, in support of their assertion that the lease, by use of the term "liquidated final damages," precluded an award of additional damages under section 15.02(d). We agree with Market Place.

The initial determination of the existence of an ambiguity rests with the court. *Wedin v. Wedin*, 57 Ark. App. 203, 944 S.W.2d 847 (1997). When a contract is unambiguous, its construction is a question of law for the court. *Fryer v. Boyett*, 64 Ark. App. 7, 11, 978 S.W.2d 304, 306 (1998). Proper contract interpretation requires us to read the contract in its entirety. *See Byme, Inc. v. Ivy*, 367 Ark. 451, ___, ___ S.W.3d ___, ___ (2006). Further, in seeking to harmonize different clauses of a contract, "we should not give effect to one to the exclusion of another even though they seem conflicting or contradictory, nor adopt an interpretation which neutralizes a provision if the various clauses can be reconciled. The object is to ascertain the intention of the parties, *not from particular words or phrases*, but from the entire context of the agreement." *Sturgis v. Skokos*, 335 Ark. 41, 53, 977 S.W.2d 217, 223 (1998) (quoting *RAD-Razorback Ltd. P'ship v. B.G. Coney Co.*, 289 Ark. 550, 554, 713 S.W2d 462, 465 (1986) (emphasis added)).

In order to determine the intention of the parties, we turn to the sections of the lease deemed by the circuit court to be in conflict. Section 15.02(c) provides for the following damages in the event Market Place terminates the lease: (1) unpaid rent due prior to the time of termination, or pre-termination rent; and (2) as "liquidated final damages," the amount by which the unpaid future rent and other sums due exceed the fair net rental value, or post-

termination rent. Section 15.02(d) provides that "Tenant shall also be liable for and shall pay to Owner" additional expenses incurred by the owner in connection with remodeling and reletting the premises after a tenant defaults and vacates the premises. Read together, the sections suggest that the parties intended for Market Place to recover damages under both sections: one section governed unpaid rent and one section governed expenses incurred in connection with reletting the premises. The lease contains no language indicating that section 15.02(c) is an exclusive damages provision, precluding recovery under section 15.02(d). Indeed, the language used in section 15.02(d) that "[i]n case of default, [the Thibodeauxes] *shall also be liable for and pay to* [Market Place]" the specified damages suggests that the intent of the parties was not to limit Market Place's damages to the unpaid rent recoverable under section 15.02(c). We disagree with the circuit court's holding that, because the parties designated some of the section 15.02(c) damages as "liquidated final damages," they intended to preclude Market Place from recovering the elements of damages described in section 15.02(d).[2] *See, e.g.*, *Leahy Realty Corp. v. Am. Snack Foods Corp.*, 625 N.E.2d 956 (Ill. App. Ct. 1993) (holding landlord's retention of security deposit as liquidated damages did not preclude recovery of other damages where it was clear that intention of parties to lease was that liquidated damages was not sole or exclusive remedy).

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[2]We note that the "liquidated final damages" referred to in paragraph 15.02(c) are not true liquidated damages because they require an after-the-fact calculation of the amount due Market Place and whether this amount exceeds the fair rental value to be paid by the subsequent tenant, while true liquidated damages are a stipulated amount in cases where the actual damages are uncertain and difficult to determine. *Phillips v. Ben M. Hogan Co.*, 267 Ark. 1104, 594 S.W.2d 39 (Ark. App. 1980).

We also disagree that the holding in *McMaster*, *supra*, requires us to hold that the lease limits Market Place's damages to those damages described by the term in section 15.02(c) as "liquidated final damages." *McMaster* involved the breach of a real-estate sales contract. The contract in that case contained a provision stating that, if the buyer failed to fulfill his obligations, "the earnest money may become liquidated damages." The trial court held that the sellers were entitled to recover actual damages and were not limited to recovery under the liquidated-damages provision. The issue in that case was whether the sellers had the option of choosing either liquidated damages or actual damages. We affirmed the trial court's decision, holding that a "shall" provision for liquidated damages limits the non-breaching party to a suit for specific performance of the liquidated-damages provision and that a "may" provision gives the non-breaching party the option of suing either for actual damages or for the liquidated damages provided for in the contract. In this case, the circuit court held that *McMaster* limited Market Place's recovery to damages under section 15.02(c) and precluded the recovery of any additional damages under section 15.02(d). We hold that our reasoning in *McMaster* is not applicable to this case.

In this case, Section 15.02(c) provided for the payment of unpaid pre-termination rent and unpaid post-termination rent upon the Thibodeauxes's default and Market Place's termination of the lease. The term "liquidated final damages" was used to describe the post-termination rent. Unpaid pre-termination rent was not included in the "liquidated final damages" but was clearly recoverable under section 15.02(c), as the circuit court found. In addition, section 15.02(d) provided that, in the event of default, the tenant was liable for the

payment of expenses, other than unpaid rent, incurred by the landlord in connection with releting the premises. All of these elements of damages were specifically described as recoverable under the lease. Unlike the issue in *McMaster*, the question in this case is not whether Market Place had the option of suing for liquidated damages under the lease or for actual damages. The question here is whether, in the event of default, the lease allowed Market Place to sue for *all* of the damages provided under the lease, or whether the term "liquidated final damages" used in section 15.02(c) of the lease limited Market Place's recovery of damages to the damages described by that term in the lease—that is, unpaid post-termination rent.

Being mindful of the object of our interpretation of this lease—ascertaining the intention of the parties—and reading the lease in its entirety and seeking to harmonize sections 15.02(c) and (d) of the lease without adopting an interpretation which neutralizes one of these sections if they can be reconciled, we hold that the circuit court erred in concluding that the lease was ambiguous. We hold that the mere inclusion of the term "liquidated final damages" to describe one element of the damages recoverable by Market Place under the lease in the event of default by the Thibodeauxes was not intended to preclude Market Place from recovering additional damages under section 15.02(d). We reverse and remand for a new trial as to the amount of damages in accordance with our decision.

Cross-appeal

On cross-appeal, the Thibodeauxes first argue that the circuit court erred in awarding Market Place the full rent for the month of October because the Thibodeauxes vacated the

premises on October 6, and the lease provided that they would only be liable for the sums due at the time they vacated the premises. The Thibodeauxes assert that the most they should be liable for is the entire September rent, $417.96 for the prorated October rent, together with a ten-percent late fee, for a total of $2,790.39. When the security deposit is subtracted, according to the Thibodeauxes, the net judgment should be $790.39. However, the lease provided that the rent was due and payable in advance on the first of the month. The case relied upon by the Thibodeauxes, *Hays v. Goldman*, 71 Ark. 251, 72 S.W. 563 (1903), is not applicable because, according to the plain terms of the lease, the entire October rent had become due when they vacated. We cannot say that the circuit court was clearly erroneous in awarding Market Place the entire October rent.

For their second point, the Thibodeauxes argue that the circuit court's award of attorney's fees was excessive in light of the amount of Market Place's recovery. An award of attorney's fees will not be set aside absent an abuse of discretion by the trial court. *Chrisco v. Sun Indus.*, 304 Ark. 227, 800 S.W.2d 717 (1990). The fact that Market Place did not recover all of the damages sought does not preclude it from recovering a fee. *Phi Kappa Tau Housing Corp. v. Wengert*, 350 Ark. 335, 86 S.W.3d 856 (2002). Market Place's attorney advised the circuit court that his fee was slightly less than $2,000, including his fee for the trial. The circuit court then awarded a fee of $1,500. An attorney's estimation of the value of his services is a proper factor for the trial court to consider in the award of fees. *Boatmen's Trust Co. of Ark. v. Buchbinder*, 343 Ark. 1, 32 S.W.3d 466 (2000). Here, the circuit court was well aware of

the record and the quality of service rendered. In such circumstances, we defer to the superior perspective of the trial judge in assessing the applicable factors. *Id*.

Reversed and remanded on direct appeal and affirmed on cross-appeal.

PITTMAN, C.J., agrees.

HART, J., concurs.